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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. **7**

26

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE
OF FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

APPELLANT'S BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 547

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE
OF FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

Appeal from the Supreme Court of the State of Wisconsin

APPELLANT'S BRIEF

The judgment sought to be reviewed was entered in the Supreme Court of the State of Wisconsin, December 15, 1948 and is reported as Estate of Miller, 254 Wis. 24 (Adv. Sh.), 35 N.W. 2d 404 (R. 9-15). The application for appeal was presented to the Supreme Court for Wisconsin January 10, 1949, (R. 15, fol. 35), and was allowed by the Chief Justice of the Supreme Court of the State of Wisconsin on the same day (R. 16, fol. 35) and was docketed in this Court February 7, 1949 (R. 20, fol. 53). Probable jurisdiction was noted by this Court by its order dated March 14, 1949 (R. 20, fol. 53).

This is an appeal to this Court from the aforesaid judgment of the Supreme Court of the State of Wisconsin, reversing an order of the County Court of Milwaukee,

Co., Wisconsin, determining the death duties payable in respect to the estate of the above-named decedent, wherein the State appealed from the tax determination of the lower court and the executor above-named filed a notice of review under state practice averring the invalidity of one of the statutes levying death duties, to-wit: Section 72.74 Wis. Stats., as construed and computed by the Wisconsin Department of Taxation on the ground that it was repugnant to the due process clause of the 14th Amendment to the Constitution of the United States. The federal statutory provision averred to sustain the jurisdiction of this Court is Section 1257, clause (2), Title 28 of the United States Code. (Jurisdictional Statement, p. 2)

GROUND UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The State of Wisconsin under and by virtue of section 72.74 Wis. Stats. (infra p. 8) imposes what is therein denominated an emergency inheritance tax of 30% measured by the sum of

(1) its normal inheritance tax which is levied upon the transferees of a decedent's Wisconsin estate. Secs. 72.01 to 72.24 Wis. Stats., Appendix pp. 24-27) and

(2) its estate tax which is levied upon the decedent's estate as a whole and which is designed to and does cover into the state treasury the difference between the 80% credit allowed to a decedent's estate under the United States Revenue Act of 1926 (26 U.S. Code, Sec. 811) for state death duties paid in respect thereof and the aggregate amount of the Wisconsin normal inheritance tax and death duties, if any, paid other states (Secs. 72.50 to 72.61 Wis. Stats., Appendix p. 27, 28)

The decedent's estate consisted of property having a taxable situs in Wisconsin of the gross value of approximately seven million dollars and tangible, real and personal property having a taxable situs in the states of Illinois and Florida of approximately a million dollars. (R. 11)

The federal 80% credit in the sum of approximately \$630,000 (R. 11) under the United States Revenue Act of 1926, *supra*, was measured by decedent's property wherever situated within the taxing jurisdiction of the United States, that is to say upon tangible property in Illinois and Florida as well as tangible and intangible property in Wisconsin. (26 U.S. Code, Sec. 811) Thus in estates of Wisconsin residents subject to both the Wisconsin normal inheritance tax and the Wisconsin estate tax, the Wisconsin emergency tax under the statutory formula as applied in the case at bar is always 30% of 80% of the federal credit, *to-wit*, 24% of the federal basic tax less 30% of death duties, if any, paid to other states.

The ground, therefore, upon which the jurisdiction of this Court is invoked is based upon the proposition that the state of Wisconsin lacked the power to do what it did, that is, measure its emergency inheritance tax in whole or in part by the value of property of a kind and character, that is to say, tangible property, beyond its taxing jurisdiction and that it did thereby take the property of the estate in contravention of the due process clause of the fourteenth amendment to the Constitution of the United States as construed in *Frick v. Pennsylvania* (1925) 268 U.S. 473, 494, 495, relied upon by the appellant in the court below, wherein it was held that no state may directly or indirectly measure its death duties by the value of tangible property beyond its territorial juris-

diction. This is so because its devolution is controlled by the foreign state and is not dependent upon the laws of the state of domicile for the protection afforded by its laws.

STATEMENT OF THE CASE

The decedent died testate, a resident of the County of Milwaukee, Wisconsin, December 19, 1943. (R. 3, R. 10, 11, fols. 28, 29) He left a gross estate having a taxable situs in the State of Wisconsin of \$6,869,778.61 (R. 3) and a gross estate consisting of real and tangible personal property having a taxable situs in the States of Illinois and Florida of \$979,936.23. (R. 1, Item 9, R. 11, fol. 29) The total gross estate was therefore \$7,849,714.84. The net federal estate taxes assessed by the United States Commissioner of Internal Revenue against the estate of the decedent was in the sum of \$3,076,131.19, (R. 9, fols. 17-25) inclusive of the 80% credit for state death duties under the United States Revenue Act of 1926, in the sum of \$630,709.62, to-wit 80% of \$788,387.02, the basic federal tax subject to the credit. (R. 9, fols. 17-25) The normal Wisconsin inheritance tax was in the sum of \$220,682.12. (R. 7, fol. 13, R. 12, fol. 30) The Illinois inheritance tax was in the sum of \$35,616.25. (R. 7, R. 12, fol. 30) The Florida estate tax was in the sum of \$21,709.45. (R. 7, R. 12, fol. 30)

The State of Wisconsin, under and by virtue of Chapter 72 of the Wisconsin Statutes, as construed by the decision of the Supreme Court of Wisconsin, from which this appeal is had and taken, so far as relevant, levies the following death duties:

(a) a normal inheritance tax imposed upon the transferees of property of a decedent by reason of

his death; (Sec. 72.01 to 72.24 Wis. Stats.) (Appendix pp. 24-27)

(b) an estate tax levied upon the estate of the decedent as a whole measured by the difference between the normal inheritance tax above mentioned, (plus death duties, if any, levied by other states) and the credit allowable under the United States Revenue Act of 1926 for inheritance and estate taxes paid to the several states of the United States; (Sec. 72.50 to 72.61 Wis. Stats.) (Appendix p. 27, 28)

(c) an emergency death duty of 30% of the combined normal inheritance tax and Wisconsin estate tax mentioned in clauses (a) and (b) (Sec. 72.74 Wis. Stats.) (infra p. 8)

The County Court of Milwaukee County, by its order determining the Wisconsin death duties, assessed the 30% emergency tax laid by Section 72.74 Wis. Stats. on the Wisconsin estate tax as computed by it. (R. 7) When the State of Wisconsin appealed from the order determining the death duties payable in respect of this estate, the appellant executor served a Notice of Review permissible under state practice as aforesaid, challenging the constitutionality of Section 72.74 Wis. Stats. on the ground that it necessarily operated to measure the tax imposed thereby upon property beyond the taxable situs of the State of Wisconsin, to-wit: Illinois and Florida, in contravention of the 14th Amendment to the Constitution of the United States as construed in *Frick v. Pennsylvania* (1925), 268 U.S. 473, 494, 495. (R. 14, 15, fols. 33, 34, R. 16-18.) This was argued to be so because the Wisconsin estate tax is in turn directly measured by the federal tax credit and the federal tax is levied upon property both within and without the taxable jurisdiction

of the State of Wisconsin. 26 U.S. Code, Sec. 811. (R. 14, 15, fol. 33, 34)

The State Supreme Court, in its opinion upon the federal constitutional question so raised, passed upon it at the foot of page 6 and the head of page 7 of its opinion, as follows: (R. 14, 15, fol. 33, 34)

"Respondent contends that the construction sought by the State renders the law unconstitutional because as computed by the department of taxation, the Wisconsin taxes are imposed on property in Florida and Illinois as well as property within this state. If that be true, then it is unconstitutional. *Frick v. Pennsylvania* (1925), 268 U.S. 473, 494, 495, 69 L. Ed. 1058, 45 Sup. Ct. 603, 606." (emphasis added)

"We are of the opinion that there is no such question presented on the facts in this case. While it is true that the estate tax is imposed in a 'catch-all' manner by absorbing eighty per cent of the federal death tax, it is apparent that more than eighty per cent of the gross estate of Mr. Miller was within Wisconsin and therefore subject to taxation by this state."

On page 4 of the opinion of the State Supreme Court (R. 13, fol. 31) will appear the manner in which the Wisconsin 30% emergency tax has been construed and applied in this case, under step (3), sub-head "Wisconsin Emergency Tax" of Table "A" appearing on that page, to-wit:

TABLE "A"

| | |
|---|--------------|
| (1) Wisconsin Normal In- herit. Taxes | \$220,682.12 |
| (2) Wisconsin Estate Tax: 80% of U. S. Estate Tax | \$630,709.62 |
| Less: (a) Wis. Normal Taxes (1) .. \$220,682.12 | |
| (b) Ill. Inherit. Taxes .. 35,616.26 | |
| (c) Fla. Inherit. Taxes .. 21,709.45 | |
| Total State Taxes ... | 278,007.83 |
| Difference | 352,701.79 |
| (3) Wisconsin Emergency Tax: Wis. Normal Taxes (1) .. 220,682.12 | |
| Wis. Estate Tax (2) .. 352,701.79 | |
| Total | 573,383.91 |
| 30% Additional Tax .. | 172,015.20 |
| Total Wisconsin Inheritance Taxes | \$745,399.11 |

Tax tenders under state practice were made in the aggregate sum of \$645,208.05 (R. 6).

The Statute of the State of Wisconsin, the validity of which is involved, so far as pertinent to this appeal, is Section 72.74 (2) Wis. Stats. of 1943, foot of p. 1177 and head of p. 1178. It reads as follows:

"72.74 *Emergency tax on inheritances.* (2) In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61 of the statutes, an emergency tax for relief purposes, rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are

made subsequent to March 27, 1935 and prior to July 1, 1945 which said tax shall be equal to 30 per cent of the tax imposed by said sections."

SPECIFICATION OF ASSIGNED ERRORS

The appellant assigns as error:

1. That the Wisconsin Supreme Court erred in holding that Section 72.74, Wis. Stats. imposing the emergency tax in controversy, as construed and applied by it, was not in contravention of the due process clause of the 14th Amendment to the Constitution of the United States as construed by this court in *Frick v. Pennsylvania* (1925), 268 U.S. 473, 494, 495; (R. 17, fol. 37)
2. That the Wisconsin Supreme Court held it to be without significance that Section 72.74 Wis. Stats., as construed and applied by it, makes no provision for the proration of the emergency tax as between property having a taxable situs in the State of Wisconsin and property having a taxable situs in other states. (R. 17, fol. 37)

SUMMARY OF ARGUMENT

I-A.

The 30% Wisconsin Emergency Inheritance Tax imposed by Sec. 72.74 Wis. Stats. when applied to estates of Wisconsin residents subject to the Wisconsin Estate Tax imposed by Sec. 72.50 Wis. Stats. where 80% or more of the estate is within the taxable jurisdiction of the State of Wisconsin is always exactly 24% of the federal 1926 basic estate tax (i.e. 30% of 80%) reduced by 30% of death duties, if any, levied by other states. It is therefore directly measured by the federal tax, which in turn is based on the value of property both within and without

the taxing jurisdiction of Wisconsin. It is entirely unnecessary to even know what property the decedent had in Wisconsin in order to compute it but merely the amount of death duties, if any, paid other states. The statute provides for no apportionment thereof with respect to the value of property having a taxable situs within and without the state and the State Supreme Court held that none was required. This is believed to be beyond its taxing jurisdiction, and therefore a deprivation of property foreclosed by the due process clause of the 14th Amendment to the Federal Constitution.

I-B.

In the case at bar 12.48% of the total gross estate was not within the taxing jurisdiction of the State of Wisconsin. Apportioning 12.48% of the 80% federal basic estate credit to the States of Illinois and Florida results in the allocation of \$78,712 to those states. But the deduction allowed for death duties paid to those states by the State of Wisconsin was only \$57,325 (i.e. 35,616, Ill. tax plus 21,709, Fla. tax) See p. 8 of this brief. The difference to-wit: \$21,387 was therefore disallowed by the State of Wisconsin as a deduction from the federal credit and operated to increase pro tanto its emergency inheritance tax by 30% of that sum, an amount also beyond its taxing jurisdiction.

I-C.

87.52% of the total gross estate was within the taxing jurisdiction of the State of Wisconsin. If the 80% federal basic estate tax credit had been apportioned accordingly, the total Wisconsin death taxes would have been \$101,545 less than those actually levied, and results in a difference of \$23,433.20 in the emergency tax.

Frick vs. Pennsylvania (1925) 268 U.S. 473, 494, 495.

Estate of Shepard (1924) 184 Wis. 88, 91, 96.

Curry vs. McCanless (1939) 307 U.S. 357, 363, 364, 365.

Union Refrigerator Transit Co. vs. Kentucky (1905) 199 U.S. 194, 202.

Maxwell vs. Bugbee (1919) 250 U.S. 525.

Great Atlantic & Pacific Tea Co. vs. Grosjean (1937) 301 U.S. 412, 424.

II.

The fact that the State of Wisconsin might have levied a Constitutional tax measured by the value of property within its taxing jurisdiction equal to or greater than the challenged tax does not operate to make the latter tax a valid exercise of its power to tax.

Owensboro National Bank vs. Owensboro (1899) 173 U.S. 664, 683.

Home Savings Bank vs. Des Moines (1907) 205 U.S. 503, 519.

III.

The 80% federal basic estate tax credit by its express terms is extended to the tax paying estate and not to the state. Therefore, the State's death tax is limited by its taxing jurisdiction to the value of property having a taxable situs therein.

26 U.S. Code, sec. 813 b.

Revenue Act of 1926, sec. 813 b.

ARGUMENT**I-A.**

The State of Wisconsin lacked the power to measure in whole or in part its 30% emergency inheritance tax by the value of property, that is to say, tangible property, real and personal, having a taxable situs beyond its taxing jurisdiction by employing as such measure a federal tax levied upon the value of property having a taxable situs both within and without the state.

It will be observed that under the State Supreme Court's construction of the statute and method of computation thereunder, the 30% emergency death duty, laid by Section 72.74 Wis. Stats., is always exactly 30% of the federal 1926 basic estate tax credit (26 U.S. Code, sec. 813 b) and therefore 24% of the federal 1926 basic estate tax, (26 U.S. Code, sec. 810) i.e. 30% of 80%, (reduced by 30% of death duties, if any, levied by other states) as shown by the illustrations of the operation and effect of the tax as hereinafter noted. The conclusion would appear to be inescapable that the 30% emergency death duty so laid by Wisconsin is directly geared to the federal tax, which, in turn, is based, as before stated, upon property both within and without the taxing jurisdiction of Wisconsin.

26 U.S. Code, sec. 811, so far as material, reads:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States ***"

That a substantial federal question thus arises appears to be manifest in the light of the holding of this Court

in *Frick v. Pennsylvania* (1925), 268 U.S. 473, 494, 495. The doctrine of this case, first announced in 1925, has ever since been consistently followed by this Court in the field of inheritance taxation and is one of the landmarks of the law of inheritance taxation in the United States.

In that case, the State of Pennsylvania, the state of decedent's domicile, sought to measure its inheritance tax in part on the value of tangible personal property located in New York and Massachusetts. But the Court denied the power of the state so to do. In that connection, it said at pp. 494, 495:

"(3) One ground on which the state court put its decision was that in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the state had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the state's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. If Pennsylvania could tax according to such a standard, other states could. It would mean, as applied to the Frick estate, that Pennsylvania, New York, and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each state had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate;

but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others."

The following illustrations of the operation and effect of Section 72.74 Wis. Stats., levying the 30% Wisconsin death duty, would seem to show conclusively that this tax is measured directly by the federal basic tax of 1926 when applied to different Wisconsin estates which are subject to different Wisconsin normal taxes but where the taxpayer in each case is required to pay a federal basic tax of \$125,000.00:

| Wisconsin Normal Tax | Federal 80% Credit | Wisconsin Minimum Taxes as Construed by State Supreme Court | Additional Emergency Tax in Excess of Federal Credit | Additional Emergency Tax Expressed as % of Fed. Basic Tax |
|----------------------|--------------------|---|--|---|
| 20,000 | 100,000 | 130,000 | 30,000 | 24% |
| 30,000 | 100,000 | 130,000 | 30,000 | 24% |
| 40,000 | 100,000 | 130,000 | 30,000 | 24% |
| 50,000 | 100,000 | 130,000 | 30,000 | 24% |
| 75,000 | 100,000 | 130,000 | 30,000 | 24% |
| 100,000 | 100,000 | 130,000 | 30,000 | 24% |

This may be further seen from the following table which shows the minimum Wisconsin taxes as construed and computed by the State Supreme Court which would be levied on a Wisconsin estate as the decedent's federal estate becomes subject to varying federal estate taxes:

| Federal Basic Estate Tax | Federal 80% Credit | Total Wisconsin Taxes as Construed by State Supreme Court | Additional Emergency Tax in Excess of Federal Credit | Additional Emergency Wisconsin Tax Expressed as % of Fed. Basic Tax |
|--------------------------|--------------------|---|--|---|
| 100,000 | 80,000 | 104,000 | 24,000 | 24% |
| 200,000 | 160,000 | 208,000 | 48,000 | 24% |
| 300,000 | 240,000 | 312,000 | 72,000 | 24% |
| 400,000 | 320,000 | 416,000 | 96,000 | 24% |
| 500,000 | 400,000 | 520,000 | 120,000 | 24% |

It will be seen that this Wisconsin tax is wholly independent of the size, composition or manner of distribution of the decedent's Wisconsin estate. *It is entirely unnecessary to even know what property the decedent had in Wisconsin in order to compute it but merely the amount of death duties, if any, paid other states.*

In the case at bar, quoting figures to the nearest dollar, the basic federal estate tax under the 1926 Act was \$788,387, the 80% credit, 80% of that sum, to-wit \$630,709. 30% of this credit is \$189,212, which is 24% of the basic federal tax (i.e. \$788,387). The death duties paid the states of Illinois and Florida were in the aggregate sum of \$57,325. 30% of the latter sum is \$17,197. Thus subtracting, therefore, 30% of the total Illinois and Florida death duties, to-wit said sum of \$17,197 from 24% of the basic federal estate tax in the sum of \$189,212 aforesaid leaves \$172,015, the emergency inheritance tax in controversy levied by the State of Wisconsin. Thus it is made manifest beyond cavil that under the challenged decision of the state court which by that decision is expressly made applicable to the estate of every Wisconsin resident where 80% or more of his estate has a taxable situs in Wisconsin and is subject to both the state normal and estate tax, the emergency inheritance tax is always equal to 24% of the federal basic estate tax less 30% of death duties paid other states.

I-B.

In the case at bar 12.48% of the total gross estate of the decedent was not within the taxing jurisdiction of the State of Wisconsin but within the exclusive taxing jurisdiction of Illinois and Florida, that being the ratio ex-

pressed percentage-wise obtained by dividing the aggregate gross value of the Illinois and Florida property, to-wit \$979,936 by the total gross value of the decedent's estate, to-wit \$7,849,714. But 12.48% of the federal 80% basic estate tax credit is \$78,712.56 a sum substantially in excess of the aggregate Illinois and Florida death duties, which were in the sum of \$57,325 and upon which the State of Wisconsin allowed a deduction of 30% thereon against the 80% credit. Hence it will be seen that even if the State of Wisconsin had the power to measure its tax by the value of property beyond its taxable jurisdiction it does not base its deduction for out of state death duties upon the proper proportion or allocation of the property not subject to its taxing jurisdiction.

I-C.

Again, if the State of Wisconsin for the purposes of the 30% emergency inheritance tax had confined itself to availing itself of its proper proportion of the 80% federal credit and no more, namely 87.52% (i.e. \$6,869,778, the Wisconsin estate, divided by \$7,849,714 the total estate) its proportion of the credit would have been \$552,597 in lieu of \$630,709. Subtracting therefrom the state normal inheritance tax and the aggregate death duties paid Illinois and Florida we obtain the following table for the computation of the 30% state emergency tax as well as total Wisconsin death duties.

**HYPOTHETICAL TABLE
(FEDERAL CREDIT APPORTIONED)**

| | |
|---|--------------|
| (1) Wisconsin Normal Inheritance Taxes | \$220,682.00 |
| (2) Wisconsin Estate Tax: 87.52% of Federal basic estate tax credit (\$630,709) allocable to Wis. Taxable estate. | \$552,597.00 |
| Less: (a) Wis. Normal Inherit. Tax \$220,682.00 | |
| (b) Ill. Inherit. Tax 35,616.00 | |
| (c) Fla. Estate Tax 21,709.00 | |
| Total contra items under Sec. 72.50 | |
| Wis. Stats. | 278,007.00 |
| Wisconsin Estate Tax | 274,590.00 |
| (3) Wisconsin Emergency Tax: Wis. Normal Taxes... \$220,682.00 | |
| Wis. Estate Tax 274,592.00 | |
| Total 495,274.00 | |
| 30% Emergency Tax thereon 148,582.00 | |
| Total Wis. death duties | \$643,854.00 |

A comparison of the state's table of computation (p. 8 of this brief, R. 13, fol. 31) with the foregoing Hypothetical Table gives us the measure of error, i.e. the excess in tax which was beyond the state's power to levy and therefore confiscatory had it confined itself to its proper proportion of the federal credit. This excess is \$101,545.00 (i.e. 745,399 — 643,854), and results in a difference of \$23,433.20 in the emergency tax.

Hence it becomes quite clear that to bring the state statute imposing the Wisconsin 30% emergency inheri-

tance tax within the applicable constitutional limitation of the due process clause of the 14th Amendment to the federal Constitution, the statute necessarily requires amendment by the state legislature by adding thereto a proviso that in computing the Wisconsin Estate Tax for the purposes of the 30% emergency inheritance tax only so much of the federal 80% credit aforesaid may be employed as the proportion of the value of the gross estate subject to the taxing-jurisdiction of Wisconsin bears to the total gross estate of the decedent.

That the Wisconsin Supreme Court in an earlier decision (1924) fully recognized that it was without power to impose a death duty upon property beyond its jurisdiction clearly appears from the majority opinion in the case of *Estate of Shepard*, 184 Wis. 88, where the following language apposite to the contentions of the appellant was employed (p. 91).

"The state must have jurisdiction of the subject matter of the tax. Such subject matter is the transfer of title to property from a decedent to another. If the state has nothing to do with such transfer, it has no jurisdiction to impose an inheritance tax * * *. Either the property transferred must be within the state or the decedent must have died a resident thereof or some recourse to the courts or laws of our state must be necessary to secure the transfer in order to confer jurisdiction to impose a valid tax."

Then to further emphasize that the question was one of power to impose the tax, the court further observed. (p. 96)

"But it is a question of power not of policy."

This view of the question is further expounded in still more apposite terms in the decision of this court in *Curry v. McCanless* (1939) 307 U.S. 357, in the opinion by Justice Stone, wherein it was said (p. 363):

"That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make disposition of putative rights in them for purposes of conflict of laws, and for purposes of taxation is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since."

(pp. 364, 365) "• • • Other states have been said to be without jurisdiction and so without Constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax. See *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 202, *Frick v. Pennsylvania*, 268 U.S. 473, 489, et seq."

"Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is rights which are not related to physical things."

The case of *Maxwell v. Bugbee* (1919) 250 U.S. 525, distinguished in the *Frick* case, involved the inheritance tax law of New Jersey which expressly provided for measuring the tax on the transfer of property within the state of a non-resident decedent upon the proportion which the local property bore to the entire estate. It is this provision which is wholly absent from the Wisconsin statute imposing the emergency tax and which in the case at bar the Wisconsin Supreme Court treated as without significance.

Likewise the case of *Great Atlantic & Pacific Tea Co. v. Grosjean* (1937) 301 U.S. 412 which involved the imposition of an occupation or license tax upon chain stores by the State of Louisiana measured by the proportion which the number of intra state stores bore to the total

number of both intra and extra state stores was held valid by the very fact that an apportionment was required by the state law. This court at p. 424 reiterated the position it took in the *Frick* case which it expressly cited as follows:

"Second. The appellants contend the Act deprives them of property without due process of law because the tax is imposed, at least in part, upon things which are beyond the jurisdiction of Louisiana. The State may not tax real or tangible personal property lying outside her borders; nor may she lay an excise or privilege upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed. But as we have seen, the subject of the tax in question is the prosecution of a defined business activity within the State of Louisiana—the conduct of a retail store which is part of a chain under a single management, ownership or control—a legitimate subject of a license or occupation tax." (Citing among others the *Frick* case).

II.

It is of course self-evident that the State of Wisconsin, had it within its constitutional power to lay an inheritance tax equal to the challenged tax or greater (short of confiscation) on property within its taxable jurisdiction but as this court was at pains to point out in *Owensboro National Bank v. Owensboro*, 173 U.S. 664 at p. 683.

"If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the Act of Congress, then that Act becomes meaningless and the power to enforce it in any given case will not exist. This follows that if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case.

The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid does not strike us as worthy of serious consideration."

This question, therefore, revolves itself into a pure question of power to do one or the other thing, and not into an inquiry as to whether the state could accomplish lawfully an equal or greater revenue yielding result so far as the money proceeds of the tax is concerned. It was so expressly ruled in *Home Savings Bank vs. Des Moines* (1907) 205 U.S. 503, at p. 519.

"It is said that where a tax is levied upon a corporation, measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the state has the power to levy one, and has not the power to levy the other. The question here is one of power, and not of economics. If the state has not the power to levy this tax, we will not inquire whether another tax, which it might lawfully impose, would have the same ultimate incidence."

III.

Moreover, it does not follow that because the federal estate tax act makes it possible for the states to absorb the 80% credit by the levy of a state death tax, a state tax may be imposed on and measured by the credit so absorbed without apportionment for the obvious reason that the federal credit becomes available through the exercise of the taxing power of the several states which in turn is

limited to property having a taxable situs therein. The credit by its express terms is extended to the taxpayer and not to the state. (26 U. S. Code, sec. 813 b) When the states, therefore, in order to cover into their treasuries all or any part of the amount of the credit so extended to the taxpaying estate, levy a state tax therefor, they may not under the holding in the *Frick* and related cases use the credit as a measure of the tax without apportionment as between property within and without its jurisdiction to tax, since Congress alone possesses the power to levy an estate or inheritance tax on the value of property beyond the taxable jurisdiction of any one of the states.

CONCLUSION

It is accordingly for the reasons stated respectfully submitted that Section 72.24 Wis. Statutes as construed and applied by the State Supreme Court is an unconstitutional exercise of the State's power of taxation as limited by the due process clause of the 14th Amendment.

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Counsel for Appellant.

APPENDIX

Statutes Involved

FEDERAL 1926 BASIC ESTATE TAX

26 U. S. Code, Sec. 810, so far as material, reads:

"A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title. (here follows table of rates)

26 U. S. Code, sec 813 b, so far as material, reads:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States ***"

26 U. S. Code, sec. 318 b, so far as material, reads:

"The tax imposed by section 810 *** shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, or any possession of the United States, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent). The credit allowed by this subsection shall not exceed 80 per centum of the tax imposed by section 810 ***"

Note: *Revenue Act of 1926, sec. 813 b*, so far as material, read:

"The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any

property included in the gross estate. The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed by this section, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 304."

WISCONSIN NORMAL INHERITANCE TAX

The provisions of sections 72.01 to 72.24 *Wisconsin Statutes 1943* imposing the "normal" inheritance taxes, so far as material, are as follows:

"72.01 Subjects liable. A tax shall be and is hereby imposed upon any transfer of property, real or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, except county, town or municipal corporations within the state, for strictly county, town or municipal purposes, and corporations of this state organized under its laws or voluntary associations organized solely for religious, charitable or educational purposes, which shall use the property so transferred exclusively for the purpose of their organization, within the state, in the following cases, except as hereinafter provided:

"(1) While a resident of state. When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

"(2) Nonresident's property within the state. * * *

"(3) Transfers in contemplation of death. * * *

"(4) Transfer before or after passage of act. * * *

"(5) Transfer under power of appointment. * * *

"(6) Joint interests. * * *

"(7) Insurance part of estate. * * *

"(8) Basis of tax. The tax so imposed shall be upon the clear market value of such property at the rates hereinafter prescribed and only upon the excess of the exemptions hereinafter granted. Inheritance and estate taxes imposed by the government of the United States shall be deemed debts and shall be deducted in determining the value of the property transferred.

"(9) Reciprocity as to nonresident decedents.
* * *

"72.02 Primary rates, where not in excess of twenty-five thousand dollars. When the property or any beneficial interest passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in section 72.04, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

"(1) Two per centum, where. (Close relationships set forth.)

"(3) Six per centum, where. (More remote relationships set forth.)

"(4) Eight per centum, where. (Distant relationships set forth.)"

"72.03 Other rates, where in excess of twenty-five thousand dollars. The foregoing rates in section 72.02 are for convenience termed the primary rates. When the amount of the clear value of such property or interest exceeds twenty-five thousand dollars, the rates of tax upon such excess all be as follows:

"(1) (Twice primary rates on \$25,000 to \$50,000.)

"(2) (Three times primary rates on \$50,000 to \$100,000.)

"(3) (Four times primary rates on \$100,000 to \$500,000.)

"(4) (Five times primary rates over \$500,000.)"

"72.035 Rate limit. The tax imposed by section 72.02 and section 72.03 shall not exceed 15 per cent of the property transferred to any beneficiary."

"72.04 Exemptions. The following exemptions from the tax, to be taken out of the first twenty-five thousand dollars, are hereby allowed:

"(1) (Transfers to municipal corporations and for religious, charitable, educational, etc. purposes.)

"(2) (\$15,000 to widow, \$5,000 to husband, and \$2,000 to each beneficiary within close relationship in the 2% bracket)

"(4) (\$250 to each beneficiary within more remote relationship in 6% bracket)

"(5) (\$100 to each beneficiary within distant relationship in 8% bracket)

"(6) (Exemption of resident's tangible personal property located out of the state)

"(7) (Bequests for burial lot, etc.)

"(8) Whenever a tax may be due from the estate, or the beneficiaries therein, of any resident or non-resident decedent, upon the transfer of any property, when the property or estate left by such decedent is partly within and partly without this state, or upon any stocks, bonds, mortgages or other securities representing property or estate partly within or partly without the state, any beneficiary of such estate shall be entitled to deduct only a proportion of his share of the debts, expenses of administration, and of his Wisconsin exemption, equal to the proportion which his interest in the property within the state or within its jurisdiction bears to his entire interest in such estate." ***

"72.12 County Courts. (1) Jurisdiction. The county court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under the inheritance tax laws, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have

jurisdiction to hear and determine all questions arising under the provisions of the inheritance tax laws and to do any act in relation thereto authorized by law to be done by a county court in other matters or proceedings coming within its jurisdiction; and if two or more county courts shall be entitled to exercise any such jurisdiction, the county court first acquiring jurisdiction hereunder, shall retain the same to the exclusion of every other county court.

"(2) •••

"(3) •••

"72.15 Hearing and determination of Tax. (1)

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"(10) Order of county court determining value of estates and liability to tax. Upon the determination by the county court of the value of any estate which is taxable under the inheritance tax laws, and of the tax to which it is liable, an order shall be entered by the court determining the same, which order shall include a statement of (a) the date of death of the decedent, (b) the gross value of the real and personal property of such estate, stating the principal items thereof, (c) the deductions therefrom allowed by the court, (d) the names and relationship of the persons entitled to receive the same, with the amount received by each, (e) the rates and amounts of inheritance tax for which each such person is liable, and the total amount of tax to be paid, (f) a statement of the amount of interest or penalty due, if any. Such order shall be in the form prescribed by the department of taxation. A copy of the same shall be delivered or mailed to the county treasurer, the state treasurer, and the department of taxation, and no final judgment shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed.

“72.23 Taxes; payment; application. All taxes levied and collected under sections 72.01 and 72.24, inclusive, less any expenses of collection, the percentage to be retained by the county, and the deduction authorized under sections 72.01 to 72.24, inclusive, shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government and to such other purposes as the legislature may by law direct.”

“72.24 Definitions. * * *

WISCONSIN ESTATE TAX

The provisions of sections 72.50 to 72.61, *Wisconsin Statutes 1943* imposing the state estate tax, so far as material, are as follows :

“72.50 Tax imposed. In addition to the taxes imposed by sections 72.01 to 72.26, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States revenue act of 1926, and amendments thereto, where the decedent at the time of his decease was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty per cent, allowable under said United States revenue act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had sections 72.50 to 72.61 not been enacted. The tax imposed herein shall be collected by the several county treasurers for the use of the state, and shall be ac-

counted for and paid into the state treasury within the time and in the manner specified in section 72.19."

• • • •

"72.61 Provisions applicable. The provisions of chapter 72, relating to the tax on inheritances and transfers, shall apply to the taxes imposed by sections 72.50 to 72.61 in so far as the same are applicable and not in conflict with the provisions hereof."